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No. 82-300

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE TRAVELERS INSURANCE COMPANY,
APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

On Appeal From the Supreme Judicial Court
For The Commonwealth Of Massachusetts

REPLY BRIEF FOR APPELLANT THE TRAVELERS INSURANCE COMPANY

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REPLY BRIEF FOR APPELLANT THE TRAVELERS INSURANCE COMPANY

I. SECTION 47B IS NOT A STATE STATUTE THAT MERELY "TOUCHES" FEDERAL LABOR POLICY IN AN "INCIDENTAL" WAY.

The Commonwealth devotes considerable attention to the task of propping up a straw man and knocking it down. It presupposes a state law which only "touches" or "concerns" collective bargaining policies and procedures in an incidental, remote or minor way, and it prognosticates that preemption

in such cases would "vitiat[e] all state regulation" of many matters that have traditionally been regulated by the states. It urges that a state law of this type should not be preempted by the NLRA. Motion of the Commonwealth of Massachusetts To Affirm Or Dismiss (hereinafter "Comm. Brief"), pp. 20-22.

No one would quarrel with this. Insignificant interference is inconsequential and should not lead to preemption. Section 47B, however, is patently not in this category. Its impact upon the collective bargaining process is direct and overriding. Either the terms of insured collectively bargained plans are changed to conform to the statute or else the plan must operate stripped of its insurance. Not merely of insurance for mental health benefits, but of insurance for all health benefits of whatever kind. In the real world of employee benefit plans this is a very formidable brand of interference indeed. And it is being exerted in an area of labor-management relations that the Supreme Court has long insisted must be free from state encroachment—collective bargaining with respect to mandatory subjects of bargaining under the NLRA.

It is no answer simply to say, as the Massachusetts court did below, that Section 47B does not place an "*absolute*" restriction on the parties' collective bargaining freedom—because they theoretically can elect to give up all insurance. App. A. at 19a. This head-in-the-sand evaluation of the statute's impact ignores reality. To warrant preemption, the interference with federal labor policy need not be "absolute". A serious constraint will suffice.

The line between (1) incidental, indirect, remote, minor intrusions upon federal labor policy and (2) forms of interference which are direct, immediate and significant will doubtless be marked out by future preemption decisions. Wherever the precise dividing line may be, however, it is reasonable to place Section 47B in the second category. The statute, as applied in the context of insured employee benefit plans, (1) compels either a change or a breach of (2) specific

terms of collective bargaining agreements relating to (3) a mandatory subject of collective bargaining. The federal policy at stake is the most important of them all—freedom of collective bargaining from governmental compulsion, the "fundamental premise on which the [NLRA] is based." *H.K. Porter & Co.* v. *NLRB*, 397 U.S. 99, at 108 (1970).

II. *New York Telephone* Does Not "Reject" The Reasons Supporting Preemption Here.

The Commonwealth asserts that *New York Telephone Co.* v. *New York Department of Labor*, 440 U.S. 519 (1979) "has implicitly rejected Appellants' argument by upholding a state statute with a significant, direct impact on collective bargaining." Comm. Brief, p. 22. This is incorrect. No rejection of Appellant's preemption position is involved. In fact, the converse is true.

The New York statute in question was one allowing striking employees to collect unemployment benefits from the state. In a plurality opinion reflecting the views of three Justices it was held that the state law was not preempted by the NLRA. A majority of five Justices, however, determined that the law did interfere with federal labor policy and was presumptively preempted. Two of these five went on to rule that the presumption of preemption was rebutted because Congress in the Social Security Act had impliedly authorized such a state statute despite its impact on federal labor policy. If there had been no such controlling federal statute, the position of a majority of the Court would have been that the New York law is preempted by the NLRA because it impinges upon an area of labor-management relations which was designed to be protected from state compulsion and left to the "free play of

economic forces". *Lodge 76, International Assoc. of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976).

In the present case, as distinguished from *New York Telephone*, there is no federal statute in which Congress has expressed its intention to authorize state statutes such as Section 47B despite their interference with federal labor policy. ERISA expressly disclaims any Congressional intention to modify or supersede the NLRA or any other federal law except those specifically repealed or amended by the Act. 29 U.S.C. § 1144(d).[1] And the McCarran-Ferguson Act, as discussed earlier (Travelers' Jurisdictional Statement, pp. 13-16), expressly provides for the continued application of the NLRA. 15 U.S.C. § 1014. Under these circumstances the presumption of preemption raised by Section 47B's coercive impact is not rebutted.

From one standpoint the case for preemption is, if anything, stronger here than in *New York Telephone*. Both Section 47B and the state statute in *New York Telephone* exert a form of economic or financial coercion. In the case of Section 47B, however, it is directed, not at the protected self-help activities surrounding collective bargaining, but at the core collective bargaining process itself.

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[1] This section provides:

> "Nothing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States (except as provided in [29 U.S.C. §§ 1031 and 1137(b)] or any rule or regulation issued under any such law."

29 U.S.C. § 1031 repeals the Welfare and Pension Plans Disclosure Act and makes certain other amendments not involving the NLRA. 29 U.S.C. § 1137 prohibits Labor or Treasury Department employees from administering ERISA or the IRC with respect to employee benefit plans of which they are members, other than a plan which covers only federal employees.

III. Since Even The Three Courts Which Have Excepted Mandated Benefit Laws From NLRA Preemption Disagree Concerning The Grounds For The Exception, Plenary Review Would Serve A Useful Purpose.

The Commonwealth continues to stress, as a primary argument for excepting Section 47B from preemption, that Section 47B "do[es] not regulate labor management relations as such, but merely touch[es] on *areas of peripheral concern* to the NLRA. . . ." Comm. Brief, p. 9 (emphasis added). Its brief concludes with the statement that "In sum, Section 47B affects *only peripherally* subjects of mandatory collective bargaining." Comm. Brief, p. 28 (emphasis added).[2]

Yet, significantly, the Supreme Judicial Court of Massachusetts *did not accept* this "peripheral concern" argument below.[3] It did not accept it even though it was emphasized in the Commonwealth's oral and written presentations, and even though both the First Circuit (in *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978)) and the New Hampshire Supreme Court (in *Metropolitan Life Ins. Co.* v. *Whaland*, 119 N.H. 894, 410 A.2d 635 (1979)) had previously relied on it in dealing with

[2] In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959) the Supreme Court said that "[w]hen the exercise of state power over a particular area of activity threaten[s] interference with [a] clearly indicated policy of industrial relations," preemption is appropriate. However, state regulation will be excepted from NLRA preemption when "the activity regulated [is] a merely peripheral concern of the [NLRA]."

[3] The cases which have excepted from preemption state regulation of matters "of peripheral concern" to the NLRA have for the most part related to potential jurisdictional disputes between the state courts and the NLRB. They fall within the first line of preemption analysis designed to protect the "primary jurisdiction" of the National Labor Relations Board. State court jurisdiction over an issue will be considered peripheral and will not be preempted "where the possibility of conflict with federal [labor] policy is. . . remote," when "the potential conflict is too contingent, too remotely

the New Hampshire mandated benefit law. Instead, the Massachusetts court applied a preemption exception of its own—an exception for all "local health laws."

In *Metropolitan* the New Hampshire court also relied on the proposition that ERISA exempts the New Hampshire mandated insurance law from NLRA preemption—i.e. that Congress intended in ERISA to authorize state regulation of mental health benefits by means of insurance statutes notwithstanding any encroachment upon the NLRA. *Metropolitan Life Ins. Co.* v. *Whaland*, 119 N.H. 894, 410 A.2d 635, 642 (1979).

Neither the First Circuit in *Wadsworth* nor the Massachusetts Court in the present case placed any reliance on this ground for finding no preemption. It is plainly wrong. As mentioned above, in one section of ERISA—not referred to by the New Hampshire court—Congress explicitly disclaimed any intention to alter in any way the scope or operation of any federal law except those specifically repealed or amended by

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related to the public interest expressed in the (NLRA)," to justify restriction of the state's action. *International Assoc. of Machinists* v. *Gonzales*, 356 U.S. 617, at 621 (1957); *Linn* v. *Plant Guard Workers*, 383 U.S. 53, at 68 (1966). Where, however, the "potential for conflict with the federal [labor] scheme" is not "tangential and remote", but is "real and immediate", the state court's action will not be considered peripheral and will be preempted. *Farmer* v. *Carpenters*, 430 U.S. 290, at 301, n. 10 (1976); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, at 295-296 (1971).

In deciding not to rely on the "peripheral concern" rationale for excepting Section 47B from preemption the court below may have reasoned either (1) that Section 47B's impact on the collective bargaining process cannot be termed remote, or (2) that the "peripheral concern" doctrine is simply not suitable for resolving preemption issues which do not concern attempts by state courts to assume jurisdiction over matters reserved for the "primary jurisdiction" of the NLRB, but rather interference by the state in types of conduct designed to be free from regulation by *either* the NLRB or the states. These two distinct preemption "categories" were specifically noted by the Massachusetts court below. App. A. at 14a, n. 19.

the Act. 29 U.S.C. § 1144(d). Congress' intention to *negate* any inference that ERISA impliedly modifies the NLRA could not be plainer.

Neither *Metropolitan* nor *Wadsworth*, of course, relied on the "local health laws" exception applied by the Supreme Judicial Court of Massachusetts.

Thus, even among the three courts which have decided that mandated benefit laws such as Section 47B should be considered excepted from NLRA preemption, there is disagreement and uncertainty as to what theory furnishes an adequate basis for such an exception. Because of this disagreement—not to mention the fact that none of these proferred exceptions correctly applies here in any event—plenary review of this appeal would be particularly appropriate and helpful.

Conclusion

For the reasons stated above and in appellant's Jurisdictional Statement, the decision below should be summarily reversed or probable jurisdiction noted.

Respectfully submitted,

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